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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 540

THEODORE STITT,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THEODORE STITT,
Pro Se.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Theodore Stitt, petitioner, in person, respectfully prays that a writ of certiorari issue to review the decree (R. 423) of the United States Circuit Court of Appeals for the Second Circuit, made in the above entitled matter on July 29, 1935, and filed August 1, 1935, which decree reverses an order (R. 310) of the United States District Court for the Eastern District of New York, made March 11, 1935, fixing

the compensation of Theodore Stitt, as Referee in Bankruptcy, in the sum of $25,000, and said decree further reversing that portion of an order (R. 311, 313) of the United States District Court for the Eastern District of New York, made March 11, 1935, providing for the payment of said compensation.

Opinion.

The opinion of the Circuit Court of Appeals is not yet reported but is printed in the record (R. 415). That part relating to the referee's compensation is as follows:

> "The award of $25,000 to the referee was clearly erroneous. We have already shown that the reorganization court was without power to increase allowances fixed by the prior court and that the prior court was limited by the provisions of the Bankruptcy Act. Under Section 40 (a) of that act referees are only entitled to 'a fee of fifteen dollars * * * in each case * * * and twenty-five cents for every proof of claim filed for allowance * * * and from estates which have been administered before them one per centum commission on all moneys disbursed to creditors by the trustee * * *.' Under Section 40 (a) the referee here was limited to a fee of $15 and his filing fees and under Section 72 could not 'in any form or guise * * * receive any other or further compensation.' "

Jurisdiction.

The decree of the Circuit Court of Appeals was entered August 1, 1935 (R. 423). Petition for rehearing was denied September 18, 1935 (R. 434).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress February 13, 1925 (U. S. Code, Title 28, Sec. 347).

Question Presented.

Whether a referee is entitled under Sections 77B (i), 40-a and 40-c of the Bankruptcy Act to receive equitable and reasonable compensation for services rendered by him from time of reference of bankruptcy proceeding to time of filing of petition under Section 77B.

Statement of Facts.

In view of the addition of Section 77B to the Bankruptcy Act since the commencement of the bankruptcy proceeding, the new interpretation of Section 40 with reference to referee's commissions (*Realty Associates Securities Corporation* v. *O'Connor*, 295 U. S. 295, 55 Sup. Ct. Rep. 663), made since the referee's allowance was fixed by the District Judge, and confirmation of reorganization plan also since the allowance was made, I respectfully submit the following chronological statement:

August 8, 1933:

Allied Owners Corporation adjudicated bankrupt and referred to Referee Stitt. Estate administered for ten months thereafter under referee's supervision.

June 7, 1934:

Allied Owners Corporation's petition under Section 77B filed and approved. Oscar A. Lewis, Esq., was designated as Special Master on the plan of reorganization, on consummation thereof after its confirmation, and on the adjudication of all large claims. Referee Stitt was designated as Special Master on filing of claims and countersignature of checks.

March 5, 1935:

Referee filed petition for allowance (R. 266) in the sum of $25,000.00 for services rendered from August 8, 1933, to

June 22, 1934, the date of the filing of 77B petition. This amount consisted of $23,977.00 commissions or 35⅖% of full commissions computed at ½% of total amount of undisputed claims and the sum of $1,023.00 for 4,092 claims filed at 25 cents per claim.

March 11, 1935:

Referee's application allowed in full by Judge Inch.

March 20, 1935:

Order to show cause signed by Judge Inch as to why referee's allowance should not be reduced on the application of Reconstruction Finance Corporation, a creditor.

May 13, 1935:

Order made by Judge Inch denying application of Reconstruction Finance Corporation to reduce referee's allowance.

June 13, 1935:

Allied Owners reorganization plan confirmed. No cash is being paid under the plan. Creditors are being paid in full on the face amount of allowed claims by the issuance of new bonds with deferred maturity and reduced interest to first mortgage bondholders and debenture bondholders, by the issuance of third lien notes to creditors secured by third mortgage and unsecured creditors Additional security for out-of-town theater mortgage bondholders.

Specifications of Error to be Urged.

The Circuit Court of Appeals erred:

(1) In holding that referee was not entitled to compensation under Sections 77B (i), 40-a and 40-c for ten months'

services except $15.00 filing fees and 25 cents for each claim.

(2) In holding that under Section 72 the referee is not entitled to part commissions.

(3) In failing to consider that part of Section 40-a upon which the referee's application for allowances was based together with Sections 77B (i) and 40-c.

Reasons for Granting the Writ.

(1) An important question of Federal law of general interest is involved which has never been decided by this Court, and which it is in the public interest to have decided by this Court of last resort.

The enactment of Section 77B provided a new method for settlement of debts with creditors. It allows this method to be availed of at any time during a pending bankruptcy proceeding. The decision of the Circuit Court holds that a referee is entitled to no compensation by way of commissions no matter how long the estate has been under his supervision when superseded by a petition under Section 77B.

If this is the law (and Sections 77B (i), 40-a and 40-c seem to me to be to the contrary), it would be a simple matter for any bankrupt, creditor or stockholder to deprive a referee, who has not been satisfactory to them, of fair compensation by the device of filing a petition under Section 77B.

It is against the public interest for a referee, as to his compensation, to be placed in the complete control and at the whim or fancy of a bankrupt, creditor or stockholder.

(2) The decision of the Circuit Court of Appeals construes Section 77B (i), a new statute which has never been construed by this Court. The clear intent of that section

to provide equitable and reasonable compensation for services rendered prior to the filing of Section 77B petition is nullified by this decision.

WHEREFORE, petitioner respectfully requests that a writ of certiorari be granted as prayed for.

THEODORE STITT,
Petitioner.

Dated, October 24, 1935.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The basis for allowance of part commissions as compensation to the referee is found in Sections 77B (i), 40-a and 40-c.

Section 77B Paragraph (i).

Section 77B (i) reads as follows:

> "If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after this amendatory Act takes effect, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section, and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. * * *"

The intention of Congress to make both equitable and reasonable provision for services rendered prior to the 77B proceeding is clear. To deny the referee part commissions for services rendered for a period of ten months prior to the 77B petition would seem to make a nullity of this section.

The only limitation as to compensation under this section would seem to be by common sense inference that the allowance certainly should not be greater than that authorized

under Section 40. At the same time, it seems also to be apparent that the court could allow less than the compensation provided in Section 40 provided the amount authorized by that section should be considered more than equitable or reasonable.

Even the appellant in the Circuit Court of Appeals suggests that there is a hardship on the referee in denying him any commissions for ten months' services. At page 45 of its brief submitted to that court, the following appears:

> "Incidentally, the hardship, if any, in the instant case, is more apparent than real. The referee in the bankruptcy proceeding has been appointed as Special Master in the reorganization proceeding, and will undoubtedly become entitled to compensation for his services as such Special Master."

The contrary of the foregoing quotation is the fact. Upon the filing of the 77B petition, the referee was relieved of practically all responsibility, in that Oscar A. Lewis, Esq., was designated as Special Master in charge of the reorganization plan and, after its confirmation, was designated Special Master in charge of the consummation thereof. The referee was designated as Special Master on the filing of claims and bonds and his duties have been largely clerical.

Section 40-a.

Section 40-a reads as follows:

> "Referees shall receive as full compensation for their services, payable after they are rendered a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been ad-

ministered before them one per centum commissions on all money disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

It appears from the foregoing that referees are entitled to commissions in two events. If there is a liquidation of the estate, he is to receive one per cent on money disbursed to creditors by the trustee. If there is a composition, he is to receive one-half per cent on the amount to be paid to creditors upon confirmation. It is on the latter event that the referee based his application, although the Circuit Court of Appeals appears to have been under the impression that the referee was asking for commissions of one per cent on monies paid to creditors as in liquidation.

The word "composition" used in the statute is not restricted to a proceeding under Section 12 of the Bankruptcy Act. A reorganization has been held to be a composition.

Matter of O'Gara Coal Company, 260 Fed. 742.

Reorganization plan held not distinguishable in principle from composition in upholding constitutional validity of Sections 77 and 77B.

Continental v. *Chicago,* 294 U. S. 648, 55 Sup. Ct. Rep. 595;

In re Central (C. C. A. 2d) 75 F. (2d) 257;

Campbell v. *Allegheny* (C. C. A. 4th) 75 F. (2d) 947.

I have examined all of the reported decisions relating to Section 40. I find no case where commissions have been denied to a referee where there was a distribution to creditors either through liquidation or settlement except one. *In re Stillwell,* 12 F. (2d) 205. There the referee was guilty of misconduct.

Attention is called to the fact that resort to Section 77B was in the same bankruptcy proceeding as originally insti-

tuted. Although the corporation is now known as a debtor, there is still in effect an order of the District Court adjudicating the corporation a bankrupt. There was no change in the status of the estate when it passed to the process of reorganization under Section 77B except that the corporation became known as a debtor instead of a bankrupt. No part of the estate was disbursed or paid out to anyone when the 77B petition was filed and approved. The same bankrupt trustees were designated as debtor trustees and continued the administration of the estate including the conduct of the business of the corporation.

Section 40-c.

Section 40-c reads as follows:

> "In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee."

I find no reported decisions construing this section. It speaks for itself and says plainly that the referee is to have part commissions where the reference is revoked prior to a distribution either by dividend or compensation.

Section 72.

Section 72 reads as follows:

> "That neither the referee, receiver, marshal, nor the trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act."

This section is cited in the decision of the Circuit Court of Appeals as authority for denying the referee any com-

missions. The section is prohibitive as to any other or further compensation than that provided under Section 40-a. It does not take anything away from Section 40-a. Commissions are specifically provided for in Section 40-a. Commissions are plainly not "other or further compensation."

Inasmuch as the Circuit Court of Appeals reversed the orders providing for compensation by way of commissions, on the ground that there is no authority in law for any commissions, the question of the amount on which commissions are to be computed will not be discussed here. There is no finding that the amount allowed by the District Court was excessive or incorrectly computed. A discussion of the method of computation of commissions is in the referee's petition for rehearing (R. 424).

Conclusion.

Due regard for the integrity of bankruptcy administration by referees and every sense of fairness would seem to protest against a construction of the three sections referred to under which a referee is denied compensation for supervising the administration of the affairs of a $14,000,000 corporation, operating seven first-run motion picture theatres, for a period of ten months.

Leaving out of consideration the plight of the referee in this case, it would seem important that this Court should consider whether the compensation of referees is to be at the mercy of bankrupts, creditors or stockholders as a result of the decision herein.

The petition for writ of certiorari should be granted.

THEODORE STITT,
Petitioner.

Dated, Brooklyn, New York, October 24, 1935.